IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO 10 OF 2020

(Originating from Criminal Case No. 79 of 2019, Hanang' District Court)

GEOFREY EMMANUEL.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

12/08/2020 & 02/10/2020

GWAE, J

In the District Court of Hanang' at Hanang' ("trial court"), the appellant Geofrey Ammanuel stood charged with an offence of Unnatural Offence contrary to section 154 (1) (a) of the Penal Code Cap 16 R.E. 2002. He was eventually convicted and sentenced to serve a term of statutory minimum sentence of thirty (**30**) years imprisonment.

Aggrieved with both conviction and sentence, the appellant preferred this appeal armed with three grounds, namely:

1. That, the learned trial Magistrate erred in law and in fact in that he held that PW1, PW2, PW3 and PW4 proved the prosecution case beyond reasonable doubt.
2. That, the learned trial Magistrate erred in law and in fact in that he did not take into account the evidence of defence side i.e DW1, DW2, DW3, and DW4 and no reasons were given to that effect.
3. That, the trial court convicted the appellant notwithstanding contradictory evidence on the part of prosecution.

On the hearing date the appellant appeared in person, unrepresented, whereas the respondent was represented by **Ms. Adelaide Kasala** Senior State Attorney.

Supporting his grounds for appeal, the appellant seriously stressed on the contradiction of the prosecution evidence in the sense that there is a contradiction on the dates of the commission of the crime where PW1 stated to have occurred on 11/09/2018 while PW2 stated that the offence was committed on 11/04/2018. Further to that the appellant added that the trial court failed to consider the appellant's defence together with that of his witnesses. He thus prayed this court be pleased to re-evaluate the evidence on record so that justice can be occasioned.

On the part of the respondent, Ms. Kasala strongly resisted the appellant's appeal, she submitted thus that the evidence on record establishes that the charge

against the appellant was proved beyond reasonable doubt. According to the learned state attorney, the evidence adduced by the victim was sufficiently credible and above all the same was supported by that of PW1, a medical report as well as PW3. On the issue of contradictions of the dates Ms. Kasala was of the view that it was a mere typing error and could be cured by section 388 of the Criminal Procedure Act Cap 20 R.E 2002.

The appellant in his rejoinder maintained that the inconsistency of the date of the incident between 11/04/2018 and 11/09/2018 appearing in the proceedings and judgment goes to the root of the case.

Having summarized the arguments from both parties, before going to the merit of this appeal or otherwise, I wish to make it clear and to remind other Judicial Officers when dealing with cases involving children to avoid disclosing the identity of the child. From the proceedings and judgment of this case the trial Magistrate disclosed the name of the victim, this was quite incorrect. The Chief Justice's Circular No. 2 of 2018 made it clear and particular on the protection of identities of children a parent and Guardian of a child in adoption proceedings and of victims of sexual offences of whatever age.

That said in respect of the requirement of non –disclosure of identities of victims of sexual offences, I shall now revert to the merit or otherwise of the appeal by stating a well-settled principle of law that the burden of proof in criminal cases,

lies on the prosecution. This principle is rooted from the case of **Joseph John Makune vs. R,** [1986] T.L.R 44, where the court held:

> "The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence".

The same position was stated in the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda vs. R,** [2006] T.L.R 395, where the court held:

> "In a criminal trial the burden of proof always lies on the prosecution and the proof has to be beyond reasonable doubt"

In the 1st and 3rd ground of appeal, I should be guided by the above principle of law. I support the appellant's stance that, the prosecution evidence is contradictory for the reason that the version of their stories is contradictory and inconsistent as revealed by PW1 (the mother of the victim) who told the trial court that on 11/09/2018 at around 17: 00 hrs she was with her neighbor one Celine coming from the shop when she heard the voice of the victim coming from the house of the accused. Immediately PW1 ran to the house of the accused, the accused ran to his room while wearing his trouser and the victim ran away heading to the house of the accused's neighbor who came to be identified by the name of Kwasani Elo. On cross examination, PW1 told the court that Kwasani-the accused's

neighbor told her to report the matter to the police, however PW2-the victim when cross examined she told the court that after the incidence she went to the house of the said Kwasani Elo who **was not around**, she only found a daughter of Kwasani. Worse still the said Qwasam or Kwasani when appeared before the trial court as defence witness (DW3) had testified to the effect that he was present at his residence on the material date. For the sake of clarity part of his testimony is reproduced herein under;

> "On 11/9/2018...(victim) came to my home at 17: 00hrs I was in the kitchen my daughter asked (the victim), what happened to her and she told her that, her mother was beating her. This is what I heard while I was in the kitchen. The (victim) left with her mother".

Looking at the testimonies of the PW1, PW2 and DW3, I am firm that their evidence is quite contradictory and inconsistent. Hence making the credibility of the PW1 and PW2 to be questionable and to make the matter worse, the prosecution did not call the said Kwasani's daughter who appears to be a material witness with regard to subsequent conducts of the victim including her narration of what actually transpired immediately after the occurrence.

More so I have noted the contradictions of dates of the incident from the charge PW1 (11/9/2018) as well as the testimony of the victim who vividly told the trial court that it was on 11/4/20218 when she was raped by the appellant. I am alive

of the principle that illiterate people may not be precise of the date and or time of the commission of an offence and that such discrepancies may be legally exempted as was rightly emphasized by the Court of Appeal in **Seni and another v Republic** (1990–1994) 1 EA 542 where it was stated and I quote;

> "It is not fair for a Court to take illiterate people literally on the precision of their dates. Any discrepancies on dates on their part are apparent rather than real".

In our instant case, the contradiction of the date of the commission of the offence against the accused is serious since the difference of April 2018 and September 2018 is not minor as the difference is not imaginable. Furthermore the victim's evidence is very uncertain on whether the appellant had sexual intercourse with the victim against the order of nature due to reason that, the victim when cross examined told the court that she was not sodomized ("The accused did attack me , he did not unnaturally offended (sic) me). There is a plethora of judicial authorities on failure by the prosecution to call material witnesses; in the case of **Azizi Abdallah v. Republic** 1991 TLR 71 it was held that;

> "(i).....
>
> (ii).....

(iii) the general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

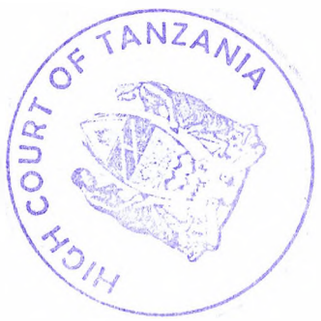
The Court of Appeal when faced with a similar situation in the case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval the authors of Sarkar, The Law of Evidence, 16th Edition, 2007 had this to say:

"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

In this particular case, I am convinced that the alleged inconsistencies and contradictions in the prosecution evidence cannot be conveniently categorized as minor discrepancies, they are indeed material as they go to the root of the matter so as to discredit the prosecution evidence. I am increasingly of the view that, taking the totality of their testimonies and considering requirement of dispensation of criminal justice in a sensible and reasonable manner by our courts. I am therefore bound to hold that, it is more unsafe to uphold the decision of the trial court convicting the appellants than acquitting them.

For the foregoing reasons, I find merit in this appeal. Accordingly, the conviction is hereby quashed and the sentence is set aside, I further order for an immediate release of the appellant unless he is lawfully detained therein.

It is so ordered.



M.R. GWAE
JUDGE
02/10/2020